Supreme Court, U.S.
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NO. 09-983

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN SCOTT PETERSON
Petitioner

V.

THE CITY OF FORT WORTH, TEXAS
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under 42 U.S.C. § 1983:

What constitutes a "pattern" of condoning clearly excessive force by officers that would create a custom or policy by which a City is liable?

What is the standard by which to evaluate ratification by a City of an officer's excessive use of force?

Does a pattern of condoning clearly excessive force after investigation create municipal liability for lack of supervision?

Does a training program which fails to train a city's officers regarding the specific force used or the consequences of such use of force make it obvious to the policymaker that the risk of injury is a plainly obvious consequence of the failure to train?

Does an ongoing pattern of excessive force by officers in and of itself make it obvious to the policymaker that the risk of injury is a plainly obvious consequence of the failure to train?

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The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. Vol. 1, A) is published at 588 F.3d 838. The district court's opinion (Pet. App. Vol. II, WW) is not published and can be found at 2008 WL 440301 (N.D.Tex. 2008).

JURISDICTION

The judgment of the court of appeals was entered on Nov. 17, 2009. (Pet. App. Vol. 1, A). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Kevin and Jody Peterson went out one night to a friend's birthday party in the Fort Worth Stockyards area. After drinking at the party, they decided it would be better not to drive home until morning. They decided to remain in the Billy Bob's Texas parking lot where many of the rodeo cowboys parked and frequently spent the night in their trailers and trucks. Jody got in the front seat and Kevin got in the back seat where they both went to sleep, fully clothed. The first thing Mr. Peterson remembers is being dragged out of the truck by his clothes, then hitting the ground on his back with two people wrestling him to the ground, rolling him over and handcuffing his hands behind his back. Then Mr. Peterson was picked up by the handcuff chain, spun around and pinned against the bed of the truck. One person was yelling in Mr. Peterson's ear and then struck him in his thigh with a hard knee strike. It was the Fort Worth police, Officers Ballard and Horner. After being questioned by the officers, the Petersons were not arrested but released and allowed to return to sleep in their vehicle. Mr. Peterson experienced increasing pain in his thigh where he had been struck and later that morning went to the emergency room, where he was immediately admitted. At the hospital, it was determined that the officer's knee strike had ruptured Mr. Peterson's femoral artery. He

underwent two surgeries to repair the ruptured artery and remained in the hospital for almost two weeks.

The Fifth Circuit Court of Appeals found that there was sufficient evidence to establish excessive use of force by Officer Ballard in this case. However, the court denied liability as against the City of Fort Worth.

The parties agreed that the police chief, Chief Mendoza, was the designated policymaker for the City of Fort Worth in this case. Chief Mendoza stated that if there is no discipline for excessive force, it could be construed as tacit approval of the use of force.

City of Fort Worth Police Department General Order 306.09 requires "any use of force incident during which the level of force used was hard open-hand control and restraint or greater shall be reported and identified as 'Use of Force by an Officer.'" The General Order specifically directs an officer to "report the full details of the use of force in related arrests or offense reports. If no arrest or offense report is to be completed, the details shall be reported in an incident report."

At the time of completing the Use of Force report, "[a] separate inter-office correspondence will be completed by the supervisor and forwarded through the officer's chain of command to be reviewed and filed by the bureau." These reports are supposed to be completed at the end of an officer's

watch and are to be entitled "Use of Force" and routed to the captain for management review. The captains are charged with reviewing the Use of Force reports "to determine if there is a need for *changes* in departmental procedures or *additional training* for the officer." (emphasis added).

Although the City of Fort Worth requires officers to complete a Use of Force report in each case where force is used during a citizen encounter, there was no such report filled out in this case. Officer Ballard denied even using a knee strike. However, Officer Horner admitted that Ballard did use a knee strike and that, even so, neither of them filled out a Use of Force report. Even though there was no Use of Force report, there was a citizen complaint and, subsequently, an internal affairs investigation. The investigation revealed that Ballard lied about using a knee strike; that Ballard did not even believe a knee strike was justified under the circumstances because Peterson was not a threat and not engaged in behavior that justified a knee strike; that a knee strike would be excessive, that the information from the officers was conflicting; that they violated policies by not filling out a Use of Force report; and that Horner falsified her report about the scene. Despite these problems, the entire Chain of Command found the excessive force complaint to be "not sustained" and the policymaker, Chief Mendoza, found that the officers acted in compliance with city policies and procedures. Thus, there was no discipline for any use of force and neither officer was disciplined for failing to fill out a Use of Force report

or otherwise reporting a use of force against Mr. Peterson.

Petitioners did not provide information on the number of Use of Force reports filed or on each citizen complaint filed. However, Petitioner did obtain and provide information reflecting many instances where an investigation of use of force by Fort Worth police was conducted and the complaint was not sustained or unfounded. These occurred even in circumstances where the use of force was clearly excessive and clearly violated the citizen's constitutional rights. They include, but are not limited to, a prior instance where a knee strike causing serious injury was used on an innocent citizen who merely tensed up while being handcuffed (even though it turned out he was the victim and not the criminal). They include a situation where the officers entered an apartment admittedly with no reasonable suspicion and no probable cause and tased a man hiding in a closet until he was unconscious and not breathing. Chief Mendoza testified that even though the officers had no reasonable suspicion of a crime and no probable cause to enter the apartment, they could justifiably use such force against a citizen. Out of 27 instances of clearly excessive force, the city condoned the excessive force on 23 of them (85%) by sustaining the complaint on only four occasions and then the city provided only minimal discipline.

With respect to training on use of force, Officer Horner could not recall receiving any training on recognizing when the force that was utilized was

adequate for the circumstances versus excessive. Officer Ballard did not recall his training, if any, regarding the difference between passive and active resistance in relation to the amount of force that may be used. Chief Mendoza testified that he has the overall authority to do the training, approving the training policies of the department. The Chief agrees that an officer is less likely to hit somebody in a place that will cause more serious damage if they understand the ramifications of doing so. The Chief further explained that the additional training that takes place subsequent to the academy does not address the use of knee strikes. Officer Ballard conceded that there's no way for an officer to evaluate the risk of injury from the use of force if there is no training in that regard. He does not recall being told that there was any risk of injury from a knee strike. It would make a difference to him in deciding which distraction technique to use to know which might cause injury, but the City never taught him about that. Officer Ballard was written up on one occasion for tasing a handcuffed suspect but never told why it was dangerous to do so. He was not subsequently retrained on the use of tasers. In fact, he is not sorry that he did it and neither is the "academy staff" who approves of what he did. Officer Ballard himself indicates that if he had appropriate training indicating the possible ramifications of using a knee strike, that it would make a difference in his evaluation of his use of force.

Chief Mendoza stated that he was the overall authority for training and approving training policies of the department. He acknowledged that an officer

is less likely to hit a person in a place that will cause more damage if they understand the reasons for doing so and he conceded that the type of injury Peterson received could result from a knee strike. He further acknowledged that the continuing education/training offered to his officers does not include training on knee strikes or the consequences of using knee strikes.

This case was filed in state court and removed to federal district court for the Northern District of Texas based upon federal question jurisdiction pursuant to 28 U.S.C. § 1446.

ARGUMENT

A. Pattern

There are two reasons for reviewing the issue of what constitutes a pattern of clearly excessive force to establish liability under 42 U.S.C. § 1983. First, the decision of the Fifth Circuit Court of Appeals conflicts with decisions by the Ninth Circuit Court of Appeals and the Third Circuit Court of Appeals. Secondly, the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

In this case, Peterson did not present all of the Use of Force reports or all of the citizen complaints of force. Rather, Peterson presented 27 instances where the officers had used force in situations involving minor crimes and where, in most instances

(85%), clearly excessive force was exonerated by the chain of command. The Fifth Circuit held that "[a] pattern requires similarity and specificity; '[p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question." citing Estate of Davis ex rel. McCully v. City of North Richland Hills, 406 F.3d 375, 383 (5th Cir. 2005). "A pattern also requires 'sufficiently numerous prior incidents,' as opposed to 'isolated instances.'" citing McConney v. City of Houston, 863 F.2d 1180, 1184 (5th Cir. 1989). The court determined that 27 instances of complaints of excessive force did not establish a pattern. App. Vol. I, U-V.

1. Conflict in Circuits

In Larez v. City of Los Angeles, 946 F.2d 630, 647 (9th Cir. 1991), the Ninth Circuit held that evidence of inappropriate investigations of citizen complaints and lack of discipline "supported the [P's] theory that the LAPD's disciplinary and complaint processes, executed by policy or custom, contributed to the police excesses complained of because the procedures made clear to the officers that, at least in the absence of independent, third-party witnesses, they could get away with anything....Aside from these allegedly flawed procedures, there was evidence of a departmental policy or custom of resorting to the use of excessive force. The jury could properly find such policy or custom from the failure of [the police chief] to take any remedial steps after the violations. [The police chief's] statements, coming from a final policymaker on police matters,

could have been considered to represent the LAPD's policy or custom of condonation of, and acquiescence in, the use of excessive force by its officers." The Larez court makes no mention of the types of offenses connected to the other complaints or the number of complaints that were reviewed. The determination that the chief's statements could be considered to represent policy is in direct conflict with the circuit court decision in the present case where the policymaker's statements concerning excessive force were dismissed as "his opinion."

In Bielevicz v. Dubinon, 915 F.2d 845 (3rd Cir. 1990), the Third Circuit addresses uncorrected use of force without reference to specificity or numerosity:

> [T]o sustain a § 1983 action against the City, plaintiffs must simply establish a municipal custom coupled with causation — i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and that this failure, at least in part, led to their injury. If the City is shown to have tolerated known misconduct by police officers, the issue whether the City's inaction contributed to the individual officers' decision to arrest the plaintiffs unlawfully in this instance is a question of fact for the jury. The Fourth Circuit, in Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), cert. denied sub nom. City of Fayetteville v. Spell, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988), clearly articulated this theory of proximate causation: "A

> sufficiently close causal link between . . . a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom." 824 F.2d at 1391. We endorse this formulation....Indeed, it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future. The Supreme Court, in Brandon v. Holt, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985), endorsed this proposition.

There are cases out of the First Circuit, Second Circuit, Seventh Circuit and Eighth Circuit that also find a custom without demanding a specific number of previous occurrences or identical nature of infraction: Baron v. Suffolk County Sheriff's Dept., 402 F.3d 225 (1st Cir. 2005) (one instance of conduct sufficient as there was evidence from which to infer that it was a longstanding practice); Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991) (there was a "custom" of malicious prosecution established by report concluding that District Attorney's office and police department had failed to investigate or discipline employee misconduct generally and there was a "lack of oversight in several different areas of criminal law" but no requirement of identity of infractions or a specific number of instances); Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) (found that custom of keeping "street files" was long standing, with no discussion of number of instances, length of time or similarity of crimes being investigated); Ware v. Jackson County, Mo., 150 F.3d

873 (8th Cir. 1998) (in referring to the fact that there were approximately seven to ten prior complaints over a seven year period of sexual abuse of inmates, and that they processed approximately 8,000 inmates annually, the court stated "[n]or does the number of mishandled complaints compared to the number of inmates undermine our conclusion where the record is replete with evidence of repeated sexual misconduct on the part of JCDC personnel").

Under the standards enumerated in these cases, the Peterson court would have considered the inappropriate investigations, the lack of discipline of the officers, the failure of any remedial steps (including no remedial training) and the chief's statement that his officers could use force even in situations where it was unconstitutional. None of the cited opinions mention any requirement of specificity regarding prior instances of excessive force or "numerous" prior incidents. These are clearly vastly different standards as applied to determining whether a pattern of conduct has been established.

Does the prior conduct have to be exactly the same? Even if officers had engaged in instances of excessive force by arm bar take downs, will those apply to a consideration of a subsequent use of excessive force by a knee strike or a taser? According to the Fifth Circuit, no. According to the First, Second, Fourth, Sixth, Seventh and Eighth, yes. There is direct conflict as to what the standard is to determine a pattern.

2. Unsettled Area of Law

There is certainly confusion amongst the circuits as to what it takes to establish a custom or policy based upon a pattern of conduct. This Court has never determined that there is a requirement for a specific number of prior instances relating to establishing a pattern. This Court has never held that the prior conduct establishing a pattern must be identical to the conduct that violated the complainant's rights. What are the parameters for determining the similarity of the conduct in question? How many instances of constitutional violations will be tolerated before it becomes an intolerable custom?

Additionally, there is confusion as to the weight to give to the opinions and statements of the policymaker, in this case, Chief Mendoza. Chief Mendoza stated a police officer may legally use force even if a police officer does not have a legal right to enter a private residence and make an arrest. The majority dismissed his statement as "his opinion." However, the dissent, as well as the decisions of other circuits such as in Larez, supra, consider such statements as evidence of policy. The type of evidence to be evinced from the policymaker is something that also needs clarification.

B. Failure to Train/Supervise

There are two reasons for reviewing the issue of what constitutes a failure to train and/or supervise to establish liability under 42 U.S.C. § 1983. First,

the decision of the Fifth Circuit Court of Appeals conflicts with relevant decisions of this Court. Second, it conflicts with decisions by numerous other circuit courts.

In this case, the majority held that "[p]articularly in the absence of evidence that the use of knee strikes had caused serious injuries on previous occasions, Peterson has presented no material fact question to show that it should have been *obvious* to the policymakers that the risk of serious injury was a 'highly predictable consequence' of the failure to train. *See* Estate of Davis ex rel. McCully v. City of North Richland Hills, 406 F.3d 375, 383, 386 (5th Cir. 2005)(deliberate indifference usually requires 'at least a pattern of similar incidents in which the citizens were injured' (citation omitted), and 'narrow' single incident exception has applied when the court finds a complete failure to train, not just a failure to train in 'one limited area')." App. Vol. 1, R.S.

1. Conflict with this Court

In City of Canton v. Harris, 489 U.S. 378, 389—90, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), it was determined that municipal liability for failure to train could be shown in two ways: First, a municipality shows deliberate indifference when it fails to train its employees to handle a recurring situation that presents an obvious potential for a constitutional violation and this failure to train results in a constitutional violation. Second, a municipality shows deliberate indifference if it fails

to provide further training after learning of a pattern of constitutional violations.

The majority in the present case combined the two prongs set out by this Court and created a hybrid that requires a higher standard for a failure to train claim. Instead of analyzing whether Mr. Peterson had presented evidence that either there was a failure to train for situations that present an obvious potential for constitutional violation or a failure to train after learning of repeated violations, the court required both types of evidence—that there was an obvious risk of injury from that specific conduct and a pattern of similar incidents causing injury.

Using the "or" standard promulgated by this Court would have allowed the court to analyze whether 1) there was an obvious risk of injury from failing to train on appropriate use of knee strikes and/or the consequences of using a knee strike or 2) the city failed to provide appropriate training after learning of repeated complaints of constitutional violations involving the use of excessive force in cases of minor infractions.

For instance, there was a prior instance where a knee strike was used by a Fort Worth police officer, causing serious injury, on a citizen who had been ordered to the ground and merely tensed up while being roughly handcuffed. The citizen turned out to be the owner of the place being burglarized and not the criminal. He was not resisting or trying to flee and the force used—the same type of knee strike that was used on Kevin Peterson—was clearly excessive.

This was one of twenty-seven incidents of citizen complaints of excessive force for minor crimes. The officers were admittedly not taught the physical consequences of using force on citizens—the potential harm. Due to the serious injuries sustained as a result of the clearly excessive force by the officers on a repeated basis, the need for additional training should have been obvious. The officer who knee struck Kevin Peterson admitted that had he known the consequences of a knee strike, it would affect his decision of what level of force to use.

One of the infractions of the officers involved was the failure to provide a Use of Force report. The reasons for requiring a Use of Force report include using it to determine if there is need for a change in practice or additional training. Thus, the city acknowledges that knowing how officers use force will provide information about the need for more training. Yet, even after admitting to the failure to provide a Use of Force report, the officers were not disciplined in any manner. While this specific incident is not causally related to the injury to Mr. Peterson since it was subsequent to his injury, it is evidence that such misconduct is accepted and that the failure to report use of force is condoned. As stated by the dissent in the present case, "[t]his, in turn, ensures there will *never* be an assessment of whether training on excessive force should be conducted with greater regularity or in a different manner." App. Vol. I, EE. This is direct evidence of deliberate indifference.

Additionally, the appellate court in the present case departed from this Court's precedent in determining that the "similarity" of the incidents constituting a "pattern" must be nearly identical. While the appellate court does not use the term "nearly identical," that is the result of its holding. The prior incidents of excessive force in this case did not all involve knee strikes, but they did involve use of excessive force in situations involving minor infractions. This should have created an obvious need for additional training of the officers on using force in situations involving minor infractions and/or for "compliance."

2. Conflict with Other Circuits

The appellate courts of other federal circuits follow the "either/or" approach of the Harris case without the "narrow exception" doctrine of the Fifth Circuit.

The appellate court in the present case assesses the "predictability" of a constitutional violation in the context of a failure to train in a manner that is different from other circuits. In the present case, the Fifth Circuit finds that there must be evidence that the violation had occurred previously in order to make it "obvious" that it might happen in the future absent training or that there must be a "complete failure to train." However, other circuits have determined that prior violations are not necessary to establish a claim: Young v. City of Providence, 404 F.3d 4, 28, 29 (1st Cir. 2005) (a jury could find an obvious risk of injury despite no

evidence of a prior incident); A.M. v Luzerne County Juvenile Detention Center, 372 F.3d 572, 583 (3rd Cir. 2004) (no evidence of incidents involving other residents than the claimant and no "complete" failure to train); Flores v. Morgan Hill Unified School District, 324 F.3d 1130, 1136 (9th Cir. 2003) (finding discrimination against gays predictable from lack of training for school administrators about sexual orientation discrimination); Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006) (city's failure to provide training on key duties with constitutional impact on rights of citizens supports a claim for failure to train).

C. Ratification

There are two reasons for reviewing the issue of what constitutes ratification to establish liability under 42 U.S.C. § 1983. First, the decision of the Fifth Circuit Court of Appeals conflicts with decisions by the Sixth Circuit Court of Appeals. Second, the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

In this case, the majority acknowledges that City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), stands for the proposition that "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." However, the Peterson decision goes on to limit the

application of Praprotnik: "[b]ut our precedent has limited the theory of ratification to 'extreme factual situations." See Snyder v. Trepagnier, 142 F.3d 791, 798 (5th Cir. 1998). Under that precedent, we cannot say that this case presents an extreme factual situation. " App. I, R-S.

1. Conflict in Circuits

In Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th cir. 1989), the Sixth Circuit found that "[f]urther evidence of a policy of deliberate indifference is found in the Sheriff's failure to investigate this incident and punish the responsible parties. It was the same type of 'ratification of the illegal acts' that the Sixth Circuit found to be a sufficient 'official policy' of the county and sheriff in Marchese v. Lucas, 758 F.2d 181, 188 (6th Cir. 1985), cert. denied, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 685 (1987)."

Following the requirements of Praprotnik, Mr. Peterson has provided evidence of a policymaker that approved of the subordinate's conduct and the basis for it. According to 9th Circuit, this is ratification. Bouman v. Block, 940 F.2d 1211, 1231 (9th Cir.), cert denied, 112 S.Ct. 640, 116 L.Ed.2d 658 (1991).

2. Unsettled Area of Law

This Court has identified a municipal "policy," even where the policymaker has failed to act affirmatively at all, so long as the need to take some action to control the agents of the government "is so

obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymake[r] ... can reasonably be said to have been deliberately indifferent to the need." City of Canton v. Harris, 489 U.S. 378, 390, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989). "Where, in the most obvious example, the policymaker sits on his hands after repeated, unlawful acts of subordinate officers and that failure 'evidences a 'deliberate indifference' to the rights of [the municipality's] inhabitants,' id., at 389, 109 S.Ct., at 1205, the policymaker's toleration of the subordinates' behavior establishes a policy-in-practice just as readily attributable to the municipality as the one-act policy-in-practice described above. Such a policy choice may be inferred even without a pattern of acts by subordinate officers, so long as the need for action by the policymaker is so obvious that the failure to act rises to deliberate indifference." Id., at 390, n. 10, 109 S.Ct., at 1205, n. 10.

This Court has not held that such ratification is limited to "extreme factual situations." Petitioner is aware of no other circuits so holding. Petitioner is unclear as to the breadth of the court of appeals' holding. Does it mean that there has to be extreme injury? Or is it directed solely at the excessive use of force? If so, does it mean that the force used has to be deadly in order for ratification to apply? In the present case, the officer used a knee strike that caused the rupture of a femoral artery—a very serious injury. The court of appeals determined that the force used on Mr. Peterson was, in fact, excessive

force. Is the reason that it was not "extreme" because there was no weapon involved? Petitioner did not allege a failure to investigate or that the policymaker passively "went along" with the conduct. In this case, there was an investigation disclosing that both officers clearly lied about the incident, that a knee strike was excessive under the circumstances (in the officer's own testimony), that neither officer was disciplined even for the acknowledged lies, that the entire chain of command condoned the conduct and that the policymaker himself found that both officers followed the city's policies and procedures. The need for action in these circumstances was very obvious. The result of condoning this conduct should be obvious.

CONCLUSION

In this area, it is hard to find a lawyer to handle a civil rights case these days, partly because nobody knows what the standards are for liability. But if civil law does not hold these cities and their police forces accountable, how will we stop abuses? Stopping abuse of power is everything in this country. It is why we have checks and balances at every level of government. A gun and a badge are powerful. Unchecked, they are the ultimate power. If a city policymaker knows of abuses by police and allows them to continue, that is not only an abuse of power by the city, it is confidence that such abuse will go unchecked. Who will protect the citizens?

Respectfully submitted,

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